Department of Justice
Washington, D.C. 20530

TO: Anthony A. Lapham
General Counsel
Central Intelligence Agency

FROM: John M. Harmon
Assistant Attorney General
Office of Legal Counsel

SUBJECT: Legal Memorandum dated 20 [illegible]

Titled: Section 1-707 of Executive Order 12036

The Attorney General has directed the Office of Legal Counsel to undertake the publication of selected opinions of this Office. We believe the attached opinion addressed to you is appropriate for publication. Unless we hear from you to the contrary within ten days, we shall assume that you have no objection to its publication.

This Office will undertake review of the opinion for accuracy of citations, etc., and will subsequently prepare an appropriate headnote. In instances involving questions of conflict-of-interest and ethical matters, the opinion will be sanitized to delete identifying details. Minor editorial revisions may also be made.

7-25-78

Department of Justice
Washington, D.C. 20530

MEMORANDUM FOR ANTHONY A. LAPHAM
General Counsel
Central Intelligence Agency

Re: Section 1-707 of Executive Order 12036

This is in response to your letter of April 26, 1978, in which you requested our opinion with respect to the meaning of § 1-707 of Executive Order 12036. 1/

Section 1-707 of Executive Order 12036 provides as follows:

> 1-7. * * * The senior officials of each of the agencies within the Intelligence Community shall:
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> * * *
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> 1-707. In any case involving serious or continuing breaches of security, recommend to the Attorney General that the case be referred to the FBI for further investigation.

We will address each of your several questions in order.

(1) Your first question is whether § 1-707 is mandatory or permissive. On the basis of the language of that provision, i.e., the use of "shall . . . recommend," we interpret the basic obligation as being mandatory.

1/ Attached to your letter was a report concerning a case that may be within § 1-707. We are referring to the Criminal Division, with a copy of this memorandum, the information you provided concerning the particular case. The Criminal Division will deal directly with you in regard to that matter. Our discussion of the meaning of § 1-707 will be general and will not address the case you described.

This is not to say, however, that the CIA and other Intelligence Community agencies are without any discretion in these matters. As discussed more fully below, it is the responsibility of the CIA (or other agency) to determine whether a breach of security is "serious" or "continuing," and this necessarily involves the exercise of discretionary judgment. Only after the Intelligence Community agency has determined that a breach is serious or continuing is it required to submit to the Attorney General a recommendation that the matter be investigated by the FBI. Of course, after a matter is sent to the Attorney General pursuant to § 1-707, he has discretion regarding whether to direct an FBI investigation of the matter. 2/

(2) You request our views on the meaning of the phrase "serious or continuing breaches of security" and whether it covers actions of persons who are not employees of the Executive branch--such persons as Members of Congress or their staffs, newspaper reporters and former Federal employees.

Executive Order 12036 does not define "breach of security." Presumably, the ordinary meaning of "security," in the context of Intelligence Community agencies, is intended. This includes programs to protect intelligence sources, methods and analytical procedures, see §§ 1-604 and 1-710, and the security of installations, activities, information and personnel, see § 1-811. See also § 4-201 which defines "communications security." A breach of security would be a possible violation of a statute, Executive order or regulation whose purpose is to safeguard such security--for example, improper disclosure of classified information. We expect that ordinarily a recommendation from an agency would pertain to a breach of the security of that agency, but a recommendation might relate to a matter involving another agency.

2/ Our Office is preparing, for the SCC, a paper regarding remedies for the unauthorized disclosure of classified information. That paper will address the policy of this Department concerning the investigation of such matters.

It is difficult to provide an abstract articulation of the meaning of "serious" or "continuing." Clearly, these terms are intended to exclude from the scope of § 1-707 any case involving a minor, one-time incident. The seriousness of a breach of security would depend upon the particular circumstances. Regarding a leak of classified information, pertinent factors might include the significance and timeliness of the information, the risks presented by the unauthorized disclosure, the nature of the disclosure (whether intentional or the result of negligence), the nature of the person who disclosed the information and his motive, and the nature of the recipient and his motive.

It is our view that the plain meaning of the word "continuing" refers to an uncompleted series of disclosures. For example, § 1-707 would apply to a situation in which there was both evidence of past leaks of classified information and reason to believe that the leaks will continue. Where the leak or series of leaks has been completed and is not continuing (or serious), § 1-706 would provide the standard for reporting, i.e., evidence of possible violations of Federal criminal law.

Because of the use of the disjunctive "or," a "continuing" breach should still be reported under § 1-707 even if the head of an Intelligence Community agency does not regard the breach as "serious."

In our opinion, § 1-707 is not limited to breaches of security by persons who are employees of the Executive branch. It could, for example, apply to a Member of Congress or his staff, though, in such cases, the question of congressional immunity will necessarily be considered by the Attorney General in determining what action to take on the recommendation. See Gravel v. United States, 408 U.S. 606 (1972). We find no basis for a blanket exemption for journalists. In appropriate circumstances, a case involving the unauthorized disclosure of classified information to a reporter or the publication of such information by a reporter could be sent to the

Attorney General under § 1-707.[3/] Additionally, it seems clear that § 1-707 covers the conduct of former, as well as present, Federal employees.

(3) You have also asked whether § 1-707 applies to non-criminal conduct. In our opinion, certain types of conduct not involving a criminal violation are covered. Contrary to the intimation in your letter, the authority of the FBI is not limited to investigating violations of Federal criminal laws. Under 28 U.S.C. 533(3), the FBI is also authorized "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." For example, the FBI could have jurisdiction over a security breach involving possible violation of a secrecy agreement, but not involving a violation of any criminal statute. Such a matter might lead to a civil action by this Department. In addition, under § 1-14 of Executive Order 12036, the FBI has certain responsibilities in the area of counterintelligence that may require investigations unrelated to the Bureau's criminal law enforcement responsibilities.

(a) You ask who should make the determination whether a breach of security is serious or continuing. As a matter of logic, it would seem to us that such determinations should be made by the CIA or other Intelligence Community agencies in the first instance. When a recommendation is made to the Attorney General pursuant to § 1-707, it should set out the basis for the Director's determination that the breach is serious or continuing.

(b) Because, in our view, a breach need not be criminal to come within § 1-707, the head of an Intelligence Community agency need not make the determination that the conduct in question is criminal.

3/ As you may know, this Department has guidelines placing limits upon the subpoenaing or interrogation of newsmen or the application for judicial warrants to search and seize material in their possession. See 28 CFR § 50.10.

Also, regarding prosecution of a newsman, First Amendment limits must be considered. See, e.g., Landmark Communications, Inc. v. Virginia, 46 U.S.L.W. 4389 (May 1, 1978), which is discussed below.

(c) You ask whether leaking classified information to the news media for publication is a crime (except where 18 U.S.C. 798 applies) and, if so, under what circumstances. There is no statute providing, as a general matter, that unauthorized disclosure of classified information is a crime. 4/ Still, depending upon the circumstances, such disclosure--including disclosure to a newsman--may be criminal.

One possibility is violation of 18 U.S.C. 641 (stealing or conversion of any record or property of the Federal Government). 5/ More pertinent are provisions of the Espionage Act, as amended, 18 U.S.C. 793(d)-(e). The latter provisions prohibit willfully communicating, to any person not entitled to receive it, "any document . . . relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." The phrase "relating to the national defense" has been construed broadly. 6/ While some classified material relating to foreign relations may not be within the scope of 18 U.S.C. 793(d)-(e), much classified material clearly would be.

The meaning of subsections 793(d)-(e) is unclear in various respects and special issues--statutory and constitutional--are raised in regard to their application to the news media. 7/ In any event, there is an important

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4/ There are several statutes prohibiting the unauthorized disclosure of certain types of classified information or disclosure to certain types of recipients. See, in addition to 18 U.S.C. 798, 42 U.S.C. 2279 (restricted data concerning nuclear weapons, etc.) and 50 U.S.C. 783(c) (communication to a foreign agent or Communist organization).

5/ This was a basis for prosecution in the Ellsberg case. See Nimmer, National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case, 26 Stan. L. Rev. 311 (1974).

6/ See Gorin v. United States, 312 U.S. 19, 28 (1941).

7/ See generally Edgar and Schmidt, The Espionage Statutes and Publication of Defense Information, 73 Colum. L. Rev. 929 (1973).

distinction between applying these provisions to (1) a newsman and (2) a current or former Federal employee. For example, the Supreme Court's decision in Landmark Communications, Inc. v. Virginia, supra, indicates that the First Amendment limits upon prosecution of a journalist for publishing confidential information do not necessarily apply to punishing a government employee who, in providing such information to the press, violated an obligation of confidentiality.

In our view, there can be circumstances, involving leaks of classified information to the news media, in which the conduct of the Federal employee would be within 18 U.S.C. 793(d)-(e), and the statute, so construed, would be constitutional. 8/ It is difficult to spell out in detail the kinds of circumstances when this would be the case.

Subsections 793(d)(e) require willfulness, but, with regard to documents or other tangible items, there is no requirement that the disclosure be based upon reason to believe that the disclosure could harm the United States or aid a foreign nation. (Only with regard to "information" is such reason to believe an element of the offense. 9/) Nonetheless, in any case arising under 18 U.S.C. 793(d)-(e), the chances of defeating a claim of interference with constitutional rights of speech or free press should be increased if there is evidence that the Federal employee had harmful intent or at least that the circumstances provided reason to believe that the disclosure could harm the United States. The greater the risk of injury to this country and the more significant the information, the less basis the employee will have to assert that his conduct is protected by the Constitution. 10/

8/ See 50 U.S.C. 798, which provides that 18 U.S.C. 793 is not to be construed as infringing upon "freedom of the press or speech as guaranteed by the Constitution . . . ."

9/ See, e.g., H.R. Rep. No. 3112, 81st Cong., 2d Sess. (1950), p. 52.

10/ It is also relevant that, under Executive Order 11652 and under Executive Order 12065 which takes effect on December 1, 1978, a person holding classified information that he believes is improperly classified is to seek re-examination of the classification. Also, under the Freedom of Information Act, as amended, 5 U.S.C. 552(b)(1), any person may in effect challenge the validity of the classification of agency records.

We will not attempt here to discuss fully the statutory and constitutional issues that are presented. 11/ For the reasons outlined above, we believe that the Government could properly investigate, in appropriate cases, the unauthorized disclosure of classified material to the news media. Of course, at the start of an investigation, there may be little or no evidence concerning the identity or motivation of the person who made the disclosure.

Our view is essentially the same with regard to the other aspect of your inquiry--unauthorized disclosure of classified information in a publication attributed to a former Government employee. In our opinion, even in that situation, the First Amendment rights of the individual to whom classified information was entrusted stand on a significantly different footing from those of writers generally. A publication by such a person could, depending upon the circumstances, be subject to criminal sanctions.

(4) Your final request is for clarification of the relationship, if any, between § 1-706 and § 1-707.

There is overlap between the two provisions, but also basic differences. As pointed out above, § 1-707 is not limited to criminal conduct and it applies in essentially the same manner to Government employees and other persons. In contrast, § 1-706 applies only to possible violations of Federal criminal law. 12/ Regarding possible violations by employees of the particular agency,

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11/ As part of our review of the espionage laws and the general matter of regulating improper disclosure of classified information, we are considering those issues.

12/ Section 1-706 provides that senior officials of Intelligence Community agencies shall--

> Report to the Attorney General evidence of possible violations of federal criminal law by an employee of their department or agency, and report to the Attorney General evidence of possible violations by any other person of those federal criminal laws specified in guidelines adopted by the Attorney General.

§ 1-706 covers any Federal crime. 13/ Regarding possible violations by other persons, only criminal laws to be specified by the Attorney General are covered.

Section 1-706 requires the reporting of evidence and thus appears to give less discretion to the agency than does § 1-707. As noted above, § 1-707 applies only to "serious" or "continuing" breaches of security, and it calls for a recommendation to the Attorney General, rather than a mere report. Still, § 1-707 contemplates that, before sending a report to the Attorney General an agency will conduct an appropriate preliminary inquiry. Under both provisions, this Department has discretion regarding whether to proceed with an investigation.

Any situation involving a serious or continuing breach of security should be handled under § 1-707.

John M. Harmon
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Office of Legal Counsel

13/ This reporting relationship is set forth in more detail in the proposed memorandum of understanding between the Agency and the Department of Justice concerning the reporting of crimes on the part of CIA officers and employees.